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No. 82-778

In The Supreme Court
OF THE
United States

October Term, 1982

WILLIAM S. JOHNSON,
Petitioner,

vs.

CENTRAL VALLEY SCHOOL
DISTRICT NO. 356,
Respondent

TO THE SUPREME COURT
OF THE STATE OF WASHINGTON
ON PETITION FOR A
WRIT OF CERTIORIAI

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e (b) (1), create a substantive right in an individual Native American, who does not hold state mandated credentials, to demand employment with a Washington state school because the School District is a recipient of a federal grant appropriated under 20 U.S.C. § 241 to assist Indian students?

2. If such a right exists, to be applicable, must it clearly be made a condition of the terms of the grant as required by this Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)?

3. If such a right exists, may a Native American, without the benefit of joinder of the United States, pursue a private claim under 25 U.S.C. § 450e(b) (1) in a state court?

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OBJECTION TO JURISDICTION

Petitioner asserts his claim under 28 U.S.C. §1257 (3). Respondent objects to the claimed basis of jurisidiction. The specifics of Petitioner's assertion of authority to seek review are not set forth in the grounds for jurisdiction. It is assumed Petitioner claims a *substantive right* has been created by the Indian Self-Determination and Education Assistance Act ("Indian Self-Determination Act")' 25 U.S.C. §450e (b) (1), which provides as follows:

> "(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934, as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible--
>
> > "(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians;..."

Pub. L. 93-638, §7, Jan. 4, 1975, 88 Stat. 2205. The Act has not been interpreted to grant to an individual a substantive right to pursue a private claim should he/she feel aggrieved. The statute only requires that to the "greatest extent feasible" preference will be given to Native Americans in the expenditure of federal funds to benefit Indians. The format of the Indian Self-Determination Act is very similar to the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §6000, *et seq.*, as discussed in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). Applying the tests of *Pennhurst, supra*, it cannot be said that by the use of the language "greatest extent feasible" Congress intended to impose the obligation upon the states to hire an otherwise unqualified individual because of his/her status as a Native American

For that reason, Respondent objects to Petitioner's claim that there is jurisdiction to raise his claim before this court.

APPLICABLE STATUTES AND REGULATIONS

20 U.S.C. §241dd provides in relevant sections:

> **Applications for grants; conditions for approval; reports; amendments**
>
> ...
>
> "(b) An application by a local educational agency or agencies for a grant under this subchapter may be approved only if it is consistent with the applicable provisions of the subchapter and--
>
> "(1) meets the requirement set forth in subsection (a) of this section;
>
> "(2) provides that the program or project for which application is made--
>
> "(A) will utilize the best available talents and resources (including persons from the Indian community) and will substantially increase the educational opportunities of Indian children in the area to be served by the applicant; and
>
> "(B) has been developed--
>
> "(i) in open consultation with parents of Indian children (including persons acting *in loco parentis* other than school administrators or officials), teachers, and where applicable, secondary school students, including public hearings at which such persons have had full opportunity to understand the program for which assistance is being sought and to offer recommendations thereon, and

"(ii) with the participation and approval of a committee composed of, and selected by, parents of children participating in the program (including persons acting *in loco parentis* other than school administrators or officials), for which assistance is sought, teachers, and, where applicable, secondary school students of which at least half the members shall be such parents;

"(C) sets forth such policies and procedures, including policies and procedures relating to the hiring of personnel, as will insure that the program for which assistance is sought will be operated and evaluated in consultation with, and the involvement of, parents of the children and representatives of the area to be served, including the committee established for the purposes of clause (2) (B) (ii);

"(3) provides that the parent committee formed pursuant to paragraph (2) (B) (ii) will adopt and abide by reasonable by-laws for the conduct of the program for which assistance is sought."

Pub. L. 92-318, Title IV, as amended November 1, 1978, Pub. L. 95-561, Title XI, §1144, 92 Stat. 2329.

20 U.S.C. §3403 provides:

Relationships with States

Rights of local governments and educational institutions

"(a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and

to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States."

Curriculum, administration and personnel; library resources

"(b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to excerise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over an accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law."

Pub. L. 96-88, Title I, §103, Oct. 17, 1979, 93 Stat. 670.

25 U.S.C. §450n provides:

Sovereign immunity and trusteeship rights unaffected

"Nothing in this Act shall be construed as--

"(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

"(2) authorizing or requiring the termination of any existing trust responsibility of the

United States with respect to the Indian people."

Pub. L. 93-638, Title I, §110, Jan. 4, 1975, 88 Stat. 2213.

The Revised Code of Washington (RCW) 28A.67.070 provides in part:

Conditions and contracts of employment--Determination of probable cause for nonrenewal of contracts--Notice--Opportunity for hearing

"No teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with a school district, hereinafter referred to as 'employee', shall be employed except by written order of a majority of the directors of the district at a regular or special meeting thereof, nor unless he is the holder of an effective teacher's certificate or other certificate required by law or the state board of education for the position for which the employee is employed."

45 C.F.R. §186.13 provides as follows:

Approval of applications.

"(a) *In general.* An application may be approved only if it is consistent with the applicable provisions of the act and this part and meets the requirements set forth in §186.12 and in this section.

"(b) *Utilization of talents; increase of educational opportunities.* An application shall provide satisfactory assurance that the program or project for which the application is made:

"(1) Will utilize the best available talent and resources (including persons from the Indian community), and

"(2) Will substantially increase educational opportunities of Indian children in the area to be served by the applicant.

"The talents and resources utilized to substantially increase educational opportunities of Indian children may include any individuals or organizations which have a particular and uncommon skill, ability, or delivery system, based on knowledge, assets, or existing capacities, to increase educational opportunities of Indian children. Educational opportunities may include, but shall not be limited to, instructional and supportive activities, services or experiences designed to meet the assessed needs of Indian children to be served in the application.

"20 U.S.C. 241dd (b) (2) (A))

"(c) *Consultation and hearings.* An application shall provide satisfactory assurance that the program or project for which application is made has been developed:

"(1) In open consultation with parents of Indian children, teachers, and, where such programs or project will serve secondary school students, Indian secondary students, including not less than one public hearing at which such persons have been given a full opportunity to understand the program for which assistance is sought and to offer recommendations thereon; and

"(2) With the participation and approval of a committee selected in accordance with §§186.15 and 186.16. Such assurance shall include at the minimum a description of the steps taken by the applicant to meet the requirements of this paragraph.

"(20 U.S.C. 241dd (b) (2) (B))"

COUNTERSTATEMENT OF THE CASE

Petitioner did not fairly summarize the facts in this case. Respondent, Central Valley School District, applied for and received a federal grant to assist in the educational development of Native American children for the 1977-78 school year. The grant was issued under the terms of the "Financial Assistance to Local Educational Agencies for Education of Indian Children", 20 U.S.C. §241aa, *et seq.* The federal regulations governing the terms of the grant appear at 45 C.F.R. §186, *et seq.*

As required by law, an advisory committee composed of Native American parents was established to assist in the administration of the grant. The committee of parents, in conjunction with the School District, determined that Native American students in the community would best be served by hiring a tutor-counselor to assist the children educationally as well as with their unique problems.

As shown in the trial court's Findings of Fact (Appendix "A"), Mr. Johnson was hired for the 1977-78 school year by the School District, upon advice from the parent committee, for the half-time position. Mr. Johnson possessed neither a teaching certificate nor a counseling certificate as required by the laws of the State of Washington. (Finding III, A.-2) An expressed condition of his employment was that he would obtain both certificates. Prior to the 1978-79 school year, Mr. Johnson did obtain a teaching certificate, but did not earn his counseling certificate. He was re-employed for the 1978-79 year, the contract being increased to three-quarters time due to additional funding.

During the 1978-79 school year, the School District was advised of two critical facts. One, federal funding for the next school year would be increased to allow employment of a full-time employee. The School District, in conjunction with the parents, determined that greater emphasis would be placed on counseling services to the students. Second, the School District was advised by the State Superintendent of Public Instruction's Office that federal funding for the grant would be jeopardized if Mr. Johnson, who lacked a counseling certificate, continued in the position. (Ex. 21. RP 173, appearing *in toto* in Appendix "B". See also Findings IX, A.-4) Mr. Johnson was terminated properly by the statutory procedure. He was also advised that should he obtain a counseling certificate he could apply for and would be considered in the same manner as all other applicants.

The position was advertised with the following statement:

> "All candidates should have applications completed and in the Central Valley School District Office no later than August 1, 1979. A valid Washington State Teaching Certificate as well as a Counseling Certificate is required. A placement file must be requested by the applicant. Indian preference will be granted..." (Ex. 12, RP 23,77)

Mr. Johnson was allowed to submit his application on August 10, 1979, after the final application date. Although the record shows Mr. Johnson had completed the requisite course work during the summer, he did not possess a counseling certificate as of that date, at the date of the interview, or on the first day of school. He was the only Native American applicant.

The parent committee conducted interviews. Mr. Covella, the candidate with the acknowledged superior qualifications and the only applicant with a counseling certificate, was recommended for hire. The School District concurred and Mr. Covella was hired.

Mr. Johnson sued alleging four claims arising under state law. Shortly before trial, the Complaint was amended to include a substantive claim under 25 U.S.C. §450e (b) (1). The School District's motions to dismiss the claim for lack of subject matter jurisdiction, failure to state a claim, failure to join the United States as a necessary party, and failure to exhaust administrative remedies were denied. The only claim upon which Petitioner prevailed after trial was the denial of the preference in hiring which the trial court found to be required by 25 U.S.C. §450e (b) (1). (Conclusion VIII, A. 15)

Contrary to Petitioner's assertion, the Washington Supreme Court ruled that he lacked certification to claim entitlement to employment under state law and that the trial court improperly applied the preference provision. Each of the defenses to the claim asserted before the trial court were raised before the Washington Supreme Court, but the case was resolved on other grounds. The judgment for Mr. Johnson was reversed.

SUMMARY OF ARGUMENT

This Court should deny the Petition because there is no substantive basis upon which Petitioner may claim jurisdiction for review. Additional grounds for denying review are that the Washington Supreme Court's decision may be affirmed on independent state grounds since it mandates minimal certification for employees. The Washington Supreme Court's decision should be sustained based upon this Court's ruling in *Pennhurst supra.* Petitioner's reliance upon *Morton v. Mancari,* 417 U.S. 535 (1974), and *Mescalero Apache Tribe v. Hickel,* 432 F. 2d 956 (10th Cir. 1970), cert. denied, 401 U.S. 981 (1971), strains a fair reading of each case and does not provide a basis for reversing the Washington Supreme Court's decision. To allow relief would conflict with controlling legislation funding the grant, 20 U.S.C. §241dd, which requires parental input in selection of the "best resource available". In addition, should a claim exist, Petitioner has failed to exhaust the appropriate administrative remedies of the grant process. Not addressed by the Washington Supreme Court, but raised on appeal, is the question of whether a claim of this nature can properly be brought in a state court. If this Court were to find that a substantive right was created for Native Americans, the private action should only be allowed in a federal court which has exclusive jurisdiction with regard to Indian claims and a necessary party to such litigation is the United States.

ARGUMENT

Petitioner's claimed substantive right to pursue a private action has been discussed as an objection to assumption of jurisdiction.

The Washington Supreme Court should be sustained and the Petition dismissed since the opinion by the Court rests on an adequate state basis. *Wilson v. Loew's Incorporated*, 355 U.S. 597 (1958) Despite protest in a footnote at page eight of the Petition, the Washington Supreme Court did follow its precedent of interpreting the law of the State as requiring the holding of the required certificate as a prerequisite to employment in the educational system. As the court stated concerning the state claims in *Johnson v. Central Valley School Dist.* , 97 Wn. 2d 419, 433,654, P. 2d 1088 (1982):

> "As we have seen, a school district has no authority to hire a person for a certificated position unless that person holds the required certificate. The doctrine of equitable estoppel cannot operate to defeat that statutory requirement. However, as we understand the trial court's decision, it did not hold that the plaintiff could have assumed the duties of the position without first obtaining a counselor's certificate, but rather that the district, through its agents, had, by permitting him to apply before he obtained the certificate, estopped themselves from asserting that he would not have been qualified when the term began. The evidence was that the certificate could have been obtained within 20 days after application was made. On the day of the interview, only 15 days remained before the opening of school. However, for purposes of this opinion, we will assume that, had the plaintiff been

> accepted for the position, he would have immediately applied for a certificate and would have obtained it prior to the beginning of the school year. We find it unnecessary to decide whether the doctrine of equitable estoppel can properly operate in these circumstances and, for purposes of this opinion, will assume that it can."

The undisputed testimony is that Mr. Johnson did not possess the appropriate certificate. Mr. Johnson alleged and the trial court ruled that the School District was estopped from relying on certification as a defense. However, the federal grant was placed in jeopardy because Mr. Johnson lacked certification. (Appendix "B") The federal legislation creating the Department of Education, which oversaw the grant during the 1979-80 school year, provides there shall be no federal intrusion in the State's determination of academic certification of personnel. 20 U.S.C. §3403 Granting Mr. Johnson's relief will require this Court to reverse the law of the State of Washington which requires all educational employees to hold the required certification to be minimally qualified. RCW 28A.67.070

Should there be jurisdiction to bring this claim under 28 U.S.C. §1257 (3), this Court should look to its recent decision in *Pennhurst, supra,* to deny the Petition. Mr. Johnson's claim is created by his status in relationship to the Indian Self-Determination Act. The School District contends that the statute does not create a new right. At best, the statute creates a legislatively defined contractual term as recognized in *Pennhurst, supra.* Relief for violation of a contractual term is contained within the legislative scheme and implementing regulations governing the grant.

Assuming *arguendo,* the Indian Self-Determination Act applies to the School District's grant, then an

administrative appeal exists through the Grant Appeals Board, 20 U.S.C. §1234, *et seq.*, with regulations found at 45 C.F.R. §16. Petitioner's remedy was to bring the matter to the attention of the Office of Indian Education within the Department of Education. At that juncture, the Office of Indian Education would have had a number of options available such as a complaint to cease and desist, negotiations between the parties and a withholding of funding. 20 U.S.C. §1234 (a), (b) and (c) Also, any grant subject to the terms of the Indian Self-Determination Act may be rescinded for violation of rights by the Secretary of Education. 25 U.S.C. §450m The Grant Appeals Board's determination can be appealed administratively with an ultimate appeal to the United States Court of Appeals. 20 U.S.C. §1234 (d) The record demonstrates this procedure was not followed by Mr. Johnson. (RP 193)

The Petition should also fail because to allow this claim would conflict with the federal legislation which funded the School District's program. In *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980), this Court ruled granting preferential treatment to Native Americans cannot be read in derogation of other co-existing legislation. The intention of the grant to the School District was not to hire and grant job security to Native American teachers. Rather the clear congressional intent of the grant to the School District was that a program to assist Native American students be developed with the participation and approval of a parental committee. 20 U.S.C. §241dd(b) The parents are at liberty to utilize the best available resource. 20 U.S.C. §241dd (b) (2) (A)

Petitioner's argument operates in derogation of the Indian Self-Determination Act. It is the purpose of the Act to provide the widest participation of Native

Americans in programs for their benefit. The parents declined, after having two years exposure to Mr. Johnson, to recommend Petitioner to the School District. Reading the two statutes so as to co-exist should give preferential treatment to the decisions of the Native American parents. To allow your Petitioner to demand employment as a matter of right would completely negate the effective input of the parent committee as required by 20 U.S.C. §241dd(b) (2) (B) and 45 C.F.R. §186.13(c).

The School District moved prior to trial to join the United States as a necessary party. (Supp. CP 52) The Office of Indian Education in the Department of Education is responsible for administering the grant program. Failure to join the United States exposed the Respondent to inconsistent obligations to the parent committee, to the State of Washington, to Petitioner and to the federal government. An action involving the United States, however, should have been commenced in federal court as there has been no waiver of sovereign immunity with regard to claims by Native Americans under the Indian Self-Determination Act. 25 U.S.C. §450n

Petitioner argues as his initial ground for granting certiorari that the Washington Supreme Court's interpretation of "greatest extent feasible" permitting the School District to select the best qualified applicant, renders meaningless a concept of preference. It is respectfully suggested that such is not a fair reading of the court's opinion. The decisions in *Morton v. Mancari, supra, Mescalero Apache Tribe v. Hickel, supra,* and the applicable statutory scheme likewise do not suggest Petitioner's version of preference. 20 U.S.C. §241dd(b) provides:

"(b) An application by a local educational agency or agencies for a grant under another subchapter may be approved only if it is consistent with the applicable provisions of the subchapter and--"

...

"(2) provides the program or project for which application is made--

"(A) *will utilize the best available talents and resources (including persons from the Indian community) and will substantially increase the educational opportunities of Indian children in the area served by the applicant;...*"
(emphasis added)

The mandate to the parent committee and the School District was to use the best available resource. Absent the question of certification, the parents had been instructed that preference was to be considered when candidates had equal qualifications (Finding of Fact XV, A.-6) The parents had an obligation to determine the needs of the children and the best resource to fulfill that need. They recommended Mr. Covella as the individual to best serve the needs of the students. Given the facts of this case, the broad reading of *Morton v. Mancari, supra,* suggested by Mr. Johnson is not warranted. The authority cited by petitioner would not require the School District to hire a Native American in the face of a contrary recommendation by the Native American parents who are required to participate in administration of the grant.

Petitioner also seeks to distinguish this Court's ruling in *Pennhurst, supra,* by placing great reliance on a letter from the HEW Division Director of the Office of Indian Education. Petitioner believes the letter requires his definition of Indian preference. The "Hakim Kahn" letter[1] does not "specifically warn," as

[1]The Hakim Kahn letter (Ex. 18) in part states:

"(6) *Question:* May Section 7 (b) of P.L. 93-638, the Indian Self-Determination and Education Assistance Act, be read to mean that an Indian job applicant who meets requirements for a position funded under Part A, as set out in the applicable job description, must be offered the position ahead of a qualified non-Indian applicant?

"*Answer:* Yes, this is a permissible reading of the Indian preference provision. Section 7(b) of P.L. 93-638 provides in relevant part as follows:

"Any contract, subcontract, grant or subgrant pursuant to this Act, the Act of April 16, 1943 (48 Stat. 596) as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians shall require that *to the greatest extent feasible--*'

"(1) preference and opportunities for training employment in connection with the administration of such contracts or grants shall be given to Indians. (Emphasis added)

"The Act does not provide further guidance as to the effect of this provision, and the legislative history of the Act does not clarify its meaning. There are no regulations which implement it as applied to Part A grants. Given the broad language of the Act and the phrase 'to the greatest extent feasible' however, an interpretation which looks to the appropriate job description to ascertain minimal qualifications for the position is permissible, although not required. Such an interpretation would mean that where an Indian meets the minimal requirements of the position, he or she must be offered it ahead of a non-Indian who may be more qualified in the terms of education, experience, and like factors. Interpretation is in accord with the provisions to be included in Federal contracts subject to the Indian preference provision under proposed rules issued by the Department of Interior August 30, 1977. (41 CFR 14-7 50002; 42 Fed. Reg. 43647, 43648.)"

suggested by Petitioner, that a broad reading of Indian preference must be given by grant recipients. (Ex. 18, RP 48, 56) The letter was in response to various questions posed by school disticts with regard to interpretations of 20 U.S.C. §241, *et seq.*, and implementing regulations. The letter first of all indicates that reading the regulation to encompass the Indian Self-Determination Act is permissible and not mandatory. Second, applying the Act requires that the Indian must be minimally qualified which Petitioner cannot assert by operation of state law. Finally, the interpretation is not to be found in the clear language of the funding legislation as required by *Pennhurst, supra.* Nor is the Act made applicable by a provision of the Code of Federal Regulations then in effect governing the grant. (The regulation was amended to include application of the preference provisions of the Indian Self-Determination Act in May 21, 1980, after the grant year in question. Such amendment renders moot much of Petitioner's argument regarding future federal grants and the need for resolution of the question by this Court.) 45 C.F.R. §187, *et seq.*, outlines the regulations implementing the Indian Self-Determination Act and is not referenced in the regulation governing the grant in issue, 45 C.F.R. §186, *et seq.* If there was intended a broader application of Indian preference, to include the School District's grant, it must be clearly stated in the governing law or regulation as required by *Pennhurst, supra,* which is controlling.

The final argument of Petitioner seems to be that this Court on prior occasion has taken the Washington Supreme Court to task for misconstruing the law with regard to Indians, citing, *Washington v. Fishing Vessel*

Assn., 443 U.S. 658 (1979). Petitioner appears to assign a hidden agenda to the decision of the Washington Supreme Court. A fair reading of *Johnson v. Central Valley School Dist., supra,* is that an unqualified teacher may not demand, as a matter of right, employment from a school district in the State of Washington. Mr. Johnson claims employment as a matter of right. A rigorous scheme of certification of educational employees has been established by the law of Washington and that scheme should be protected by this Court.

CONCLUSION

For the reasons outlined above, Respondent respectfully suggest that no pressing question of federal law has been decided by a state court which needs to be resolved by this Court as suggested by Petitioner. Rather, the State should be allowed to speak with regard to what certification it will require as a condition to seeking employment in its educational system. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT W. WINSTON, JR.

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APPENDIX A

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

WILLIAM JOHNSON, Plaintiff, vs. CENTRAL VALLEY SCHOOL DISTRICT NO. 356, Defendant	)	Cause No. 79-2-05987-5

THIS MATTER, having come on regularly before the Honorable Richard P. Guy, sitting without a jury, for trial on July 21 and July 22, 1980, and the plaintiff, William Johnson, being represented by Bryan P. Harnetiaux of Powell & Harnetiaux, and the defendant, Central Valley School District No. 356, being represented by Robert W. Winston, Jr. and Charles Matthew Andersen of Winston & Cashatt, and the Court having conducted trial in this matter and having rendered its oral opinion on July 23, 1980, having heard the respective party's Motion for Reconsideration and having denied the same and being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

I.

Plaintiff, William Johnson, hereinafter referred to as plaintiff, is a one-quarter degree Montouk Indian of the Brotherton Indian Tribe. Plaintiff is registered as a tribal member with the United States Department of Interior, Bureau of Indian Affairs.

II.

Defendant, Central Valley School District No. 356, ("School District") is a duly organized and authorized school district operating under the laws of the State of Washington, County of Spokane.

III.

In 1977, defendant School District hired plaintiff as a counselor-tutor for Indian students under a federally assisted grant program. This position was for the 1977-78 school year and was half-time in nature. Plaintiff entered into a certificated employee's contract with defendant School District (Exhibit No. 3). Plaintiff did not possess, during the 1977-78 school year, a teaching certificate issued by the State of Washington.

IV.

The position of counselor-tutor for the Indian students was created by defendant School District pursuant to a grant application to the Federal Government in 1977 for the 1977-78 school year. The grant referred to above and the grants for 1978-79 and 1979-80 were all funded under the "Financial Assistant to Local Educational Agencies for Education of Indian Children", Title IV, Public Law 92-318, 20 U.S.C. 241aa, *et seq*. The grant application was made to assist approximately 175 students of Native American ancestry attending the School District's schools. The grant funds were used to create a counselor-tutor position to work with Indian students and the funds were applied towards the benefit of the Native American students. The tutorial and counseling methods were directed towards students at the secondary level, to assist them

in educational, emotional, cultural and social needs peculiar to Native American students.

V.

The School District again applied for and received grant monies for the 1978-79 school year. The grant monies received during that school year were applied towards a counselor-tutor position for Indian students and was three-quarters time in nature. The School District also applied for and received federal funds for the 1979-80 academic year which were applied to the position of counselor-tutor for Indian students. Funding for the 1979-80 school term was sufficient to permit a full-time counselor for Native American students.

VI.

With the inception of the Indian counselor-tutor position in 1977, defendant School District had created an Indian advisory committee entitled the Central Valley Indian Advisory Committee which was composed of parents and guardians of Indian students and staff representatives from the schools. Creation of this committee was a condition of the federal grant. One of the functions of this committee was to monitor the hiring process for filling the position of Indian counselor-tutor and to make recommendations to the defendant School District as to how to fill that position. In the spring and summer of 1979 there were approximately 21 members of such advisory committee.

VII.

As a pre-condition to the grant monies, a Native American Advisory Committee was formed. The advisory committee was formulated under the provisions as

outlined in 20 U.S.C. 241aa, *et. seq.* The committee was composed of parents and teachers of Native American students as well as students of Native American ancestry. The purpose of the committee was to provide meaningful input on the part of the parents of Native American students into the educational development of their children. The functions by the Committee included making recommendations to the defendant School District as to the manner in which the grant funds were to be expended. Another function was to monitor the hiring process for filling the counselor-tutor position and to make recommendations to the School District as to how to fill the position.

VIII.

At the commencement of the 1978-79 school year, plaintiff executed a Certificated Employee's Contract and a waiver (Exhibit Nos. 4 & 28). Prior to the commencement of 1978-79 school year, plaintiff had obtained certification as a teacher in Washington.

IX.

The duties performed by plaintiff during the 1977-78 school year were primarily tutorial in nature but did include some counseling of Indian students. During the 1978-79 school year, the duties embraced counseling to a higher degree than the year before, but they remained primarily tutorial. At the time of his employment in 1977, and again at the time of his renewal in 1978, plaintiff was informed that the nature of his duties involved counseling. Plaintiff was also informed that it would be necessary in the future for him to obtain counseling certification. During the 1978-79

school year, the School District did not require counseling certification. During the 1978-79 school year the Superintendent of Public Instruction of the State of Washington notified the School District and plaintiff (Exhibit No. 21) that plaintiff would be required to obtain a counseling certificate for the 1979-80 school year. At the termination of the 1978-79 contract year, plaintiff had not obtained the counseling certificate.

X.

In June of 1979, defendant School District took steps to publically advertise for the position of Indian counselor-tutor with the District. Job descriptions were circulated to various institutions and other outlets. Such advertisement provided in part: "Indian preference will be granted."

XI.

Prior to May 15, 1979, federal funding for the 1979-80 grant application was uncertain. On May 11, 1979, defendant School District notified plaintiff in writing and orally that he would not be renewed due to financial reasons (Exhibit No. 9). Plaintiff did not appeal.

XII.

At the end of the 1978-79 school year plaintiff enrolled in Eastern Washington University graduate school for the purposes of obtaining his Masters in Guidance and Counseling and Guidance and Counseling certification so that he would be eligible for the position of Indian counselor-tutor if it were refunded for the 1979-80 school year.

XIII.

The Department of HEW sent a letter, dated May 18, 1979, notifying defendant School District that the Indian Educational Assistance grant would be forth coming. The notification of funding was received by defendant School District sometime after May 25, but before the conclusion of the school term on June 12, 1979. The nature of the position for the 1979-80 school year was changed from prior years. It was to be full-time and required a much greater degree of counseling and a counseling certificate.

XIV.

On June 26, 1979, defendant School District took steps to advertise for the position of counselor-tutor for Indian students (Exhibit No. 12). The announcement indicated that "Indian preference" would be given in hiring. The Native American Advisory Committee had recommended to the School District that the job position be left open until August 10, 1979, to afford plaintiff an opportunity to seek qualification and apply for the position. Plaintiff was notified of this. The position remained open for application until August 10, 1979.

XV.

The School District's grant administrator, Neal Prescott, and the assistant superintendent, Charles Stocker, the School District's affirmative action supervisor, had met with the Native American Advisory Group to discuss the meaning of "Indian preference". The advice given by the administration to the advisory group was that "Indian preference" meant if two individuals were equally qualified, then preference should

be given to the Indian applicant. The advisory group and the School District applied this interpretation in filling the position.

XVI.

On August 10, 1979, Mr. Neal Prescott telephonically communicated with Mr. William Johnson. The purpose of the communication was to inquire as to whether Mr. Johnson wished to be considered for the 1979-80 position of counselor-tutor for Indian students. On that date, Mr. Johnson delivered a hand-written letter to Mr. Prescott requesting that he be considered for the position (Exhibit No. 22) and letter from Eastern Washington University indicating that he would be recommended for certification as a counselor (Exhibit No. 11).

XVII.

On August 3, 1979, plaintiff completed all educational requirement necessary at Eastern Washington University for a certificate in guidance and counseling and Masters relating thereto. Plaintiff was issued a recommendation for certification dated August 3, 1979. On or before August 10, 1979, plaintiff delivered a copy of such recommendation to Neil Prescott at Central Valley School District and made written application for the position of Indian counselor-tutor with the District.

XVIII.

Approximately nine individuals had applied for the position of Indian counselor-tutor with defendant School District, only one of which was Indian--plaintiff. By August 21, 1979, the School District administration reduced the list to three individuals, plaintiff

and two caucasians, Peter Covella and John Moreland. School District administrators recommended the Native American Advisory Committee interview all three candidates and represented initially to that committee that all three were qualified. Later, District administrators would instruct the Committee that they could not consider Mr. Moreland for the position because he did not have a certificate in guidance and counseling nor any immediate prospect of receiving one.

XIX.

On August 21, the Executive Committee of the Native American Advisory Committee conducted interviews of the above three named individuals. Mr. Neil Prescott also attended such meeting. After interviewing all three individuals, the Executive Committee voted four to one to recommend Mr. Covella for the position of Indian counselor-tutor for the 1979-80 school year. Said vote was made with the idea that the Committee was at liberty to select the "best qualified" applicant, whether of Indian descent or not. At the time of this interview on August 21, 1979, plaintiff William Johnson was in all respects qualified to fill the position of Indian counselor-tutor.

XX.

The Court accepts the testimony of Dr. Robert Morrow, Executive Coordinator and Director of teaching certification at Eastern Washington University, on the subject of issuance of certificates. Dr. Morrow testified that as of August 3, 1979, plaintiff had completed all necessary educational requirements at E.W.U. for the University to recommend issuance of a guidance and

counseling certificate. Although Mr. Johnson did not apply for such certificate, the normal time lapse between application and issuance of the certificate by the Superintendent of Public Instruction is approximately twenty days. The Court finds that although the Superintendent of Public Instruction must take action to verify the contents of the application, such certificates are routinely granted upon recommendation by Eastern Washington University. Although the Court finds that the School District had consistently required that all necessary certification be on file with the School District prior to commencement of employment, the School District did not so advise Mr. Johnson. The Court further finds that the School District did not require the certificate to be on file with it before Mr. Johnson was interviewed and eligible for consideration for the position. Plaintiff was qualified for the position of counselor-tutor for Indians with Central Valley School District in all respects after August 3, 1979 and would have been eligible to assume his duties as counselor-tutor at the commencement of the 1979-80 school year and defendant School District is estopped to deny plaintiff's qualifications for consideration for the position of Indian counselor-tutor.

XXI.

At the time of the Executive Committee's interview of the three individuals, Mr. Neal Prescott, and Mr. Norm Stokke were present as representatives of the School District. Each of the school administrators conducted their own independent evaluation of the three candidates and concurred with the Executive Committee's recommendation that Mr. Covella be hired. That

occurrence was communicated to the assistant superintendent, Mr. Chuck Stocker, who also conducted an independent evaluation of the Advisory Committee's recommendation. The recommendation of the administration and the Executive Committee of the Native American Advisory Committee were forwarded to the Board of Directors. The Board of Directors accepted such recommendations on September 11, 1979, and executed a certificated employees contract with Mr. Peter Covella for the 1979-80 school year, for the position of counselor-tutor for Indian students.

XXII.

The contract year for the 1978-79 school year was completed upon the performance by plaintiff of 180.5 teaching days, which occurred on June 12, 1979. Plaintiff, as in the case of other certificated employees, received deferred payments for his performance during the 1978-79 school year throughout the summer of 1979, the last payment being received in August, 1979.

XXIII.

To the extent applicable, plaintiff's rights and privileges vis a vis the defendant School District were the subject of the contractual provisions of the Collective Bargaining Agreement, between the defendant School District and the Central Valley Education Association, during the 1978-79 school year. The provisions of the Collective Bargaining Agreement regarding reduction in force and employment pool rights were not applicable to the nonrenewal of plaintiff in May of 1979. It was the intent of the parties to the Agreement that such provisions would only apply to multiple reductions and not individual reductions.

XXIV.

In their determination regarding whether to hire William Johnson or Peter Covella for the position of Indian counselor-tutor with defendant School District, the Executive Committee of the Native American Advisory Committee, Neil Prescott, Charles Stocker, and deritively, the Board of Directors of Central Valley School District, used an erroneous definition of "Indian Preference". This Court finds that in order to effectuate the congressional intent and underline legislative policy of the Indian Education Act and the Indian Self-Determination Act, the concept of "Indian Preference" to the "greatest extent possible", requires, in this instance, that if a person of Indian origins meets the qualifications for the position that person must be offered such position even if there are more qualified persons of non-Indian descent.

XXV.

Defendant School District failed to give plaintiff Indian preference as required by the Indian Self-Determination Act and the Indian Education Act and had Indian preference been given, plaintiff would have been hired for the 1979-80 school year.

XXVI.

Had plaintiff been hired for the 1979-80 school year for the position of Indian counselor-tutor he would have made, excluding fringe benefits, $18,437.00. Plaintiff, despite good faith efforts to mitigate damages and obtain other employment was unable to do so, except for minor earnings selling wood and, after February 1980, commencement of an insulation business on his own. At

the time of trial he had earned approximately $1,713.02 in such business and this amount should be offset against the earnings lost by virtue of not being hired for the Indian counselor-tutor position. The Court has taken into account plaintiff's outstanding debts regarding the insulation business, present accounts receivable, and considering the nature of the business and the seasonal nature of employment of a school teacher, the Court finds these amounts essentially offset one another and no further adjustment should be made in the net loss of earnings. The Court notes that the plaintiff acquired assets regarding said insulation business but does not find that these acquisitions should be offset under the circumstances as they are offset by liabilities.

XXVII.

All of the acts and failures to act by defendant School District's agents and employees with respect to this case were within the scope and authority of said agents and employees and defendant Central Valley School District is responsible for such conduct.

XXVIII.

Plaintiff has asked for specific performance ordering hiring as "Indian counselor-tutor", under any of the claims for relief alleged. The Court having found a violation of the Indian Preference Law, the Court finds that the position of counselor-tutor offers a unique opportunity for one of an Indian race to benefit academically, culturally and socially members of his race. Neither plaintiff nor defendant have presented any evidence to suggest such a position is available in any other school district in the immediate vicinity or that

similar opportunities for counseling secondary school students are readily available to plaintiff. Of the school districts in Spokane County, Central Valley School District has the highest Indian population. Further, subsequent to the completion of this trial, the parties have reported to the Court that the position of "counselor-tutor" has been refunded by the federal government on a full-time basis for the 1980-81 school year at Central Valley School District. The Court finds in light of the foregoing, and plaintiff's strong desire to perform such duties, that this position is of such a unique nature that plaintiff cannot be made whole through damages alone and that defendant School District should be ordered to hire plaintiff to the 1980-81 school year in the capacity of "counselor-tutor" in order to effectuate the intent and purpose of the federal legislation herein involved. The Court finds the enforcement of such federal legislation in this matter is consonent with the remedial nature of the federal acts involved and is not likely to impair the administrative or educational process at Central Valley School District.

XXIX.

Plaintiff is entitled to all fringe benefits that would have accrued during the 1979-80 school year just as if he had been fully employed by the District throughout that year including any insurance program benefits, credit on district salary schedule, and any retirement credit that would have been earned with the Washington State Teachers Retirement System and plaintiff should be given the opportunity to make any contributions thereto that would have been made during the course of the 1979-80 school year, it being further the

finding of the Court that the District would have had to make matching contributions during the same period of time and that if plaintiff elects to make up such contributions the District should take all the steps necessary to complete its obligations in this regard.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over the subject matter and parties to this action.

II.

Plaintiff failed to establish a *prima facie* case of race or national origin discrimination under *RCW* 49.60 and such claim was dismissed orally at the end of plaintiff's case in chief and it is hereby dismissed with prejudice.

III.

Plaintiff failed to establish a *prima facie* case of unlawful delegation of authority by the defendant School District's Board of Directors or Administrators and such claim was dismissed orally at the end of plaintiff's case in chief and is hereby dismissed with prejudice.

IV.

Defendant School District did not breach any contractual obligation to plaintiff under the "Collective Bargaining Agreement" (Exhibit No. 6) in effect between the parties. The nonrenewal of plaintiff in May, 1979, did not constitute a "reduction-in-force" thereunder and plaintiff was not entitled to the "employment pool" rights specified therein.

V.

Defendant School District did not violate the common law doctrine set forth in *Peters v. South Kitsap School District*, 8 Wn. App. 809 (1973) with respect to

duty to rehire former employees for new vacancies occurring after nonrenewal and before contract expiration. Plaintiff's 1978-79 contract with defendant School District expired, for purposes of applying *Peters*, on the last day of school for that school year.

VI.

Plaintiff's status with defendant School District for the 1977-78 school year was that of a part-time noncertificated employee.

Plaintiff's status with defendant School District for the 1978-79 school year was that of a part-time certificated employee.

VII.

The federally funded full-time position of "counselor-tutor" with defendant School District for the 1979-80 school year was one funded under the Indian Education Act (20 U.S.C. 24laa *et seq.*, and related provisions), which Act is designed for the benefit of Indians.

VIII.

Defendant School District, in failing to hire plaintiff for the position of "Indian counselor-tutor" for the 1979-80 school year violated the provisions of the Indian Self-Determination Act (25 U.S.C. 450 *et seq.*, and federal regulations relating thereto) and more particularly 25 U.S.C. 450 (e)(b)(1) in failing to give "Indian preference" to plaintiff.

IX.

Plaintiff was entitled to the position of "Indian counselor-tutor" with defendant School District for the 1979-80 school year and would have been hired in such position had "Indian preference" been given. Defendant School District is estopped to deny his eligibility for

consideration for such position or qualifications to perform such duties at the start of the 1979-80 year, had he been hired.

X.

As a direct and proximate result of violation of the "Indian preference" law, plaintiff suffered lost earnings consisting of $18,437 which is reduced by other earnings during the same period of $1,713.02, leaving lost earnings of $16,723.98. Said amount being a sum certain, plaintiff is entitled to interest on such amount between June 15, 1980 and September 15, 1980 at 6% for a total of $16,980.66. Plaintiff is also entitled to taxable costs in the sum of $181.75. Thus, a Judgment totalling $17,162.41 shall be entered for the plaintiff.

XI.

Plaintiff is entitled to all fringe benefits that would have accrued to his benefit during the 1979-80 school year including insurance program benefits and eligibility, credit on district salary schedule and credit with the Washington State Teachers Retirement System including the right to make up contributions to such system that would have been made during the course of 1979-80, in which event the defendant School District shall pay in, in addition to monies referenced elsewhere in these findings and conclusions, that amount of money it would or normally be required to pay on behalf of plaintiff to such system, and this Court shall retain jurisdiction for the limited purpose of entering such orders to third parties, including the Washington State Teachers Retirement System, as may be necessary to effect this relief.

XII.

Plaintiff is not entitled to either general damages or attorney's fees. Further, plaintiff's evidence regarding mental anguish, emotional distress and humiliation was insufficient to establish *prima facie* entitlement to such general damages.

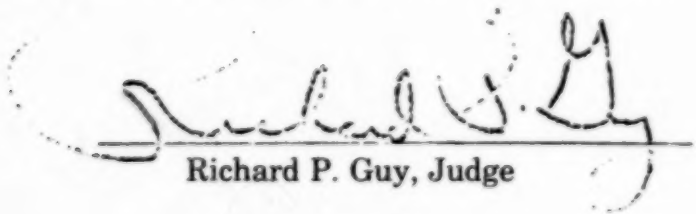
XIII.

In view of the strong congressional policy underlying the federal legislation granting "Indian preference" and the unique nature of the "counselor-tutor" position for Indians, defendant School District shall hire plaintiff as counselor-tutor for the 1980-81 school year. Such employment shall be on a written contract as a certificated employee with full rights and privileges accorded under *RCW* 28A.[illegible] and 28A.58 *except that* plaintiff's contract shall be a "provisional" one as set forth in *RCW* 28A.67.072.

XIV.

Plaintiff is entitled to entry of Judgment reflecting the relief set forth above. Said Judgment, along with these Findings of Fact and Conclusions of Law shall be equally applicable to Spokane County Cause No. 79-2-07293-6.

Done in open Court this 16 day of October, 1980.



Richard P. Guy, Judge

APPENDIX B

April 27, 1979

Dr. George M. Eisentrout, Supt.
Central Valley Sch. Dist. 356
South 123 Bowdish Rd.
Spokane, WA 99206

Dear Dr. Eisentrout:

With the exception of last year, this agency has regularly reviewed the certification status of persons serving in Educational Staff Associate (ESA) roles to determine if certification regulations adopted by the State Board of Education in 1971 and required since 1973 are being met.

We are making a special effort this year to notify superintendents and non-certificated ESA personnel before school is out for the following reasons:

1. Personnel hoping to enter or continue in preparation programs will have the opportunity to explore programs before summer sessions begin.
2. School districts will have an opportunity to recruit appropriately certificated personnel. Most of the colleges and universities will have names of newly certificated personnel by June or by the end of the summer session.
3. If Title IV-D funds are appropriated for counseling and guidance. districts employing non-certificated counselors may not be eligible to receive funds.

A compilation of information submitted by your district on the S-275 Certificated Personnel Report Form and the certification records maintained by this agency indicate that the following person(s) are as-

signed as counselors who do not hold the required ESA certification:

Mr. William Johnson

The purpose of this letter is to (1) request that you review the regulation which pertains, WAC 180-84-560; (2) ask that you encourage such persons to gain certification prior to the 1979-80 year if they are to be assigned as counselors; and (3) offer our assistance to the persons who need ESA certification.

We are sending a copy of this letter to the individual(s) concerned and encourage them to contact an approved counselor education program or consortium as soon as possible. We are enclosing a list of approved consortia as well as a resume of the preparation and certification requirements for school counselors in the state of Washington.

Should you have any questions regardinga certification requirements or procedures, please contact staff in the Certification and Licensing Section. (Phone: 206-753-6773.) If an error has been made regarding the certification status of anyone listed above, please inform Marjorie Anderson. (Phone: 206-753-6724.)

Thank you for your consideration of this important matter.

Sincerely,

DIVISION OF SPECIAL SERVICES

Michael G. Warden
Assistant Superintendent

Marjorie Anderson, Director
Pupil Personnel Services

MW:MA/cai

Enclosures

cc Mr. William Johnson

END OF DOCKET